No. 96-1590

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION,

Petitioner,

—v.—

JAMES E. AKINS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan corporation with nearly 300,000 members dedicated to protecting the First Amendment rights of all persons, regardless of their partisan political interests or affiliations.

For the past twenty-five years, the ACLU has been deeply involved in the debate over government regulation of campaign speech. Indeed, the ACLU was centrally involved in the very first cases brought under the Federal Election Campaign Act (FECA). *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975). Those two cases helped fashion various doctrines to limit the impermissible reaches of FECA, including the "major purpose" test at issue in this case.

The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976). And, since *Buckley*, the ACLU has participated in numerous political speech cases decided by this Court, both as direct counsel and as *amicus curiae*. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

The American Israel Public Affairs Committee (AIPAC) is a nonprofit, nonpartisan, issue-oriented advocacy organization with more than 50,000 supporters nationwide. It has a budget of approximately $10 million and lobbies members of Congress and the Executive Branch, as well as the general public, to support its policy positions in favor of American support for and assistance to the government and people of Israel. *See Akins v. FEC*, 101 F.3d 731, 734 (D.C.Cir. 1997)(*en banc*).

Despite its acronym, AIPAC is not a "PAC" or "political action committee," as that term is commonly understood. The issue for this Court to resolve is whether AIPAC nonetheless can be regulated as though it were a "political committee" under the Federal Election Campaign Act because of the allegation that a small, though precisely undetermined, amount and proportion of its organizational resources were sporadically employed for campaign-related activities that benefitted certain federal candidates.[2]

This case commenced with the filing of an administrative complaint with the Federal Elections Commission

[2] The Federal Election Campaign Act deems a "political committee" any entity which receives contributions or makes expenditures of more than $1,000 in a year. *See* 2 U.S.C. §434(4)(A). Contributions and expenditures are defined as the giving or spending, donating or disbursing of, among other things, money, resources or "anything of value" "for the purpose of influencing any election for Federal office." *See* 2 U.S.C. §431(8)(A); 2 U.S.C. §431(9)(A). Thus, for example, if a full-time staff person of an issue-oriented organization spent no more than one week in an entire year on activities that plausibly could be deemed "for the purpose of influencing a Federal election," the *pro rata* salary and overhead for that one staff person alone would often exceed the minimal statutory threshold and, without more, transform the entire organization into a political committee.

(FEC) in January 1989 by numerous political adversaries of AIPAC, including a former congressman who claimed he had been defeated for re-election because of AIPAC-generated campaign contributions to his political opponent. *Id.* at 733-34. The complaint charged that "AIPAC used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meetings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates." *Id.* at 734.

Based on these allegations, the complainants contended that: (1) AIPAC was a "political committee" required to comply with a number of statutory mandates and restrictions; (2) AIPAC was "affiliated" with twenty-seven other "pro-Israel" political committees run or dominated by AIPAC officials and directors, thereby severely limiting their aggregate activity; (3) AIPAC had made illegal corporate campaign contributions and expenditures; and (4) AIPAC had failed to report its election related activity to the FEC.

Only the first of these allegations is still before the Court. After reviewing the report prepared by its General Counsel,[3] the FEC concluded that, although AIPAC "likely

[3] The General Counsel's report was based on an extensive record, including thousands of pages of internal AIPAC documents, memoranda, correspondence and communications. The bulk of the report considered whether AIPAC's supporters were properly deemed "members," so that any partisan activity directed to them would be statutorily privileged, and not constitute impermissible corporate contributions or expenditures. With the exception of AIPAC's Executive Committee, the General Counsel concluded that the answer to that question was no. Although endorsing that finding, the FEC decided to dismiss the charge in the exercise of prosecutorial discretion, because the question was "a close"

(continued...)

had made campaign contributions exceeding the $1,000 threshold . . . there was not probable cause to believe AIPAC was a political committee because its campaign-related activities were only a small portion of its overall activities and not its major purpose. The campaign activities were only conducted in support of its lobbying activities." *Id.* at 734.

Respondents then filed suit in the United States district court challenging the FEC's refusal to bring charges against AIPAC and disputing the FEC's use of the major purpose test. Agreeing with the FEC, the district court held that the major purpose test for determining whether a group is a "political committee" was an essential restraining feature of campaign finance law, based on the concern that "issue-oriented groups might [otherwise] be silenced by the burdensome requirements of the FECA." Pet.App. 87a.

On appeal, a divided panel affirmed. 66 F.3d 348 (D.C.Cir. 1995). Citing *Buckley v. Valeo*, 424 U.S. 1, and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, the majority concluded that any definition of a political committee that did not include the "major purpose" test would raise "grave constitutional difficulties." *Id.* at 354. As the majority explained:

> A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). It is our duty in the interpretation of a federal statute to avoid serious constitutional doubt.

Id. at 355-56. The panel also rejected respondents' contentions that the major purpose inquiry was designed to probe the purpose of the contribution or expenditure, not of the organization or group that made it, and that the rule only applies when groups make expenditures, not contributions.

The panel's decision was reversed *en banc*. 101 F.3d 730. Eschewing the moderation of the major purpose test, the *en banc* court concluded that if AIPAC -- or any comparable organization -- used as little as $1,001 of resources in an arguably partisan way, the entire organization could be deemed a "political committee" subject to all of the restrictions, regulations, disclosures and controls prescribed by FECA. The *en banc* court brushed aside this Court's ratification of the major purpose test in *Buckley* and *Massachusetts Citizens* on the grounds that those cases involved independent expenditures, not coordinated expenditures or direct contributions, and thus the narrowing concerns of those cases were inapplicable outside the expenditure context. The majority also reasoned that, under the major purpose formulation properly understood, it is "the purpose of the organization's disbursements, not of the organization itself, that is relevant." 101 F.3d at 743. Otherwise, the court below concluded, the FEC's interpretation of "political committee" would:

> allow a large organization to contribute substantial sums to campaign activity as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements im-

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[3] (...continued)
one. 101 F.3d at 734. The D.C. Circuit has since rejected the FEC's interpretation of the membership rule in another case. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C.Cir. 1995).

> posed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee while another organization spending $1 million of its $100 million budget on campaign activity would not.

Id. Finally, the court rejected the Commission's suggestion that other statutory provisions would satisfy the government's legitimate interest in disclosure with less intrusion on First Amendment rights.

SUMMARY OF ARGUMENT

Under the holding below, any group or organization, no matter how large or small, no matter how nonpartisan or issue-oriented, which uses a *de minimis* amount of its resources in any way that could plausibly be characterized as "for the purpose of influencing any Federal election" is deemed a "political committee" and thereby subject to the extensive regulations imposed by the Federal Election Campaign Act, including disclosure of members, contributors, disbursements and activities. That ruling is fundamentally at odds with a central tenet of this Court's campaign finance jurisprudence: the imperative of protecting issue advocacy from campaign finance controls.

In furtherance of that goal, this Court's opinion in *Buckley* repeatedly stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgment of [First Amendment] freedoms." *E.g.*, 424 U.S. at 25, 64. Two particular restrictions adopted in *Buckley* are critical here. First, the *Buckley* Court ruled that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate . . . ." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons . . ." *Massachusetts Citizens*, 479 U.S. at 249, protects and safeguards issue-oriented speech. For two decades, it has played a crucial role in providing a bright line between permissible and impermissible government regulation.

Second, the *Buckley* Court concluded that the statutory definition of a "political committee" must also be narrowed to avoid constitutional difficulties. Specifically, the Court held that "[t]o fulfill the purposes of the Act [the disclosure and other obligations of political committees] need only [apply to] organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. As construed by the *Buckley* Court, therefore, the major purpose doctrine provides a second line of defense for issue advocacy groups to avoid improper and unwarranted campaign regulation. That doctrine protects and safeguards issue-oriented speakers.

The decision of the court of appeals in this case ignores both these essential elements of *Buckley*. Instead, it embraces a constitutionally overbroad definition of a "political committee" that is unnecessary to serve the government's asserted interest in providing the public with information regarding the source of political funding. That interest can be, and is, fully served by the disclosure obligations currently imposed upon the recipients of contributions by 2 U.S.C. §434(b)(3). Furthermore, the interest in public awareness of the source of coordinated or independent expenditures by groups that are not political committees is adequately satisfied by the disclosure requirements of 2 U.S.C. §434(c). Given these less restrictive alternatives, the far more expansive approach to campaign finance regulation endorsed by the court below fails the narrow tailoring requirement.

ARGUMENT

THE FIRST AMENDMENT'S CORE PROTECTIONS FOR ISSUE-ORIENTED ADVOCACY PRECLUDE TREATING NONPARTISAN GROUPS AS "POLITICAL COMMITTEES" AND THEREBY SUBJECTING THEM TO THE FEDERAL ELECTION CAMPAIGN ACT'S FULL PANOPLY OF REGULATIONS, DISCLOSURES AND CONTROLS

As this Court explained in *Buckley v. Valeo*, 424 U.S. at 15, the Federal Election Campaign Act's contribution and expenditure limitations operate "in an area of the most fundamental First Amendment activities."

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957) . . . "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Id. at 14-15.

The Court reaffirmed that principle most recently in *McIntyre v. Ohio Elections Commission*, 115 S.Ct. at 1518, when it struck down a ban on anonymous leafletting in issue-oriented campaigns as an unconstitutional restriction on "core" political speech. To protect that speech from the chilling effect of over-regulation, the *Buckley* Court fashioned the express advocacy doctrine as the primary mechanism for safeguarding issue-oriented speech from campaign finance controls.

Buckley also recognized that the First Amendment necessarily protects political association as a means of fostering such speech:

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas" . . . .

424 U.S. at 15 (citations omitted). To protect political associations from the chilling effect of over-regulation, the *Buckley* Court fashioned the major purpose test as the primary mechanism for safeguarding issue-oriented organizations from campaign finance controls.

Both the express advocacy test and the major purpose test thus reflect a single, overriding principle of First Amendment jurisprudence: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the

restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Commission*, 115 S.Ct. at 1519. As first articulated in *Buckley* and later reaffirmed in *Massachusetts Citizens for Life*, the express advocacy and major purpose tests are constitutionally compelled limits on the otherwise fatal reach of FECA. Together, they mark the boundaries where permissible campaign finance regulation ends and unrestrained issue speech begins. The decision below obscures those boundaries and thereby undermines the First Amendment safeguards that this Court has so carefully erected.

A. The Express Advocacy Doctrine

One of the central elements of this Court's campaign finance jurisprudence has been the critical distinction between: (1) contributions and expenditures made by federal candidates, their campaigns and those who expressly advocate their election or defeat; and (2) all other issue advocacy and activity, even though it might influence the outcome of an election. This constitutional divide is compelled by the First Amendment and is built upon the concept that only "express advocacy" -- *i.e.*, an explicit call for the election or defeat of a particular candidate -- can be subject to regulation.

This is not to suggest that there is an always obvious distinction between issue speech and electoral advocacy. Quite the contrary, as this Court recognized in *Buckley*:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues but campaigns themselves generate issues of public interest.

424 U.S. at 43. If any mention of a candidate in the context of discussion of an issue rendered the speaker or the speech subject to campaign finance controls, the consequences for "free discussion" would be intolerable and speakers would be compelled "to hedge and trim." *Id.*, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

Accordingly, while candidate-focused contributions, expenditures and express advocacy can be subject to regulation, all speech which does not "in express terms advocate the election or defeat of a clearly identified candidate" is outside the scope of permissible regulation. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views," *Buckley*, 424 U.S. at 45, and they are also free from reporting and disclosure requirements. *Id.* at 79-80. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. at 238.

The express advocacy doctrine thus provides powerful protection for issue-oriented speech by reducing the risk that issue advocacy will be subject to unconstitutional regulation. Its categorical approach is comparable to other landmark doctrines, like the "actual malice" concept of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or the "incitement test" of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Properly applied, it is a vital safeguard for issue organizations. The problem has been that enforcement actions under FECA have too often disregarded the bright line protections that the doctrine affords.

Indeed, the very first enforcement suit brought under the new Federal Election Campaign Act involved a handful

of dissenters who had published a two-page advertisement in The New York Times in May 1972 urging the impeachment of President Richard Nixon and praising the few members of Congress who supported that view. *United States v. National Committee for Impeachment*, 469 F.2d 1135. The United States filed suit claiming the advertisement was "for the purpose of influencing" the elections that year, thereby requiring the approval of all candidates that the ad might be construed as "on behalf of," and rendering the *ad hoc* group of ad sponsors a "political committee" subject to all of the law's new regulations and controls.

That view was rejected by the courts. Drawing the now-settled distinction between issue speech and express advocacy, the Second Circuit ruled that it would be an "abhorrent" and "intolerable" consequence if FECA allowed the government to "regulat[e] the expression of opinion on fundamental issues of the day." *Id.* at 1142. Additionally, the court held that the Act could only be applied to groups under the control of candidates or those making contributions or expenditures "the major purpose of which is the nomination or election of candidates." *Id.* at 1141. Thus were the seeds of both the express advocacy and major purpose tests planted.

The *Committee for Impeachment* suit was followed by *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041. That case arose when the ACLU sponsored an advertisement shortly before the 1972 elections criticizing the Nixon Administration's anti-busing policies and praising a member of Congress who had resisted the President on that issue. The court ruled that the portion of the Act which treated the ACLU advertisement as "on behalf of" the campaigns of members of Congress and "in derogation of" President Nixon's candidacy, "establishe[d] impermissible prior restraints, discourage[d] free and open discussion of matters of public concern and as such must be declared an unconsti-

tutional means of effectuating legislative goals." *Id.* at 1051. Turning to those portions of FECA that would have treated the ACLU as a "political committee," the *Jennings* court followed the lead of the Second Circuit and ruled that issue-oriented groups whose major purpose is not the election of candidates could not be covered by the Act:

> We are satisfied that by so constricting the reaches of Title III, the fears of constitutional infringements expressed by plaintiffs will be eliminated. They and other groups concerned with the open discourse of views on prominent national issues may, under both this ruling and that of the Second Circuit, comfortably continue to exercise these rights and feel secure that by so doing so their associational rights will not be encroached upon.

Id. at 1057.

These assurances, unfortunately, were short-lived. Only one year later, the 1974 amendments to FECA included a provision, 2 U.S.C. §437a, designed to regulate issue-oriented groups in ways that *Jennings* and *Committee for Impeachment* had ruled impermissible.[4] That provision was

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[4] 2 U.S.C. §437a provided, in pertinent part:

> Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidates who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidates or to with-

(continued...)

challenged as part of the *Buckley* litigation. The D.C. Circuit, which upheld every other provision of the new law, unanimously struck down §437a as an unconstitutional regulation of nonpartisan political speech. As the circuit court recognized, the broad statutory language of §437a prohibited even the discussion of campaign issues and candidate voting records, which are "vital and indispensable to a free society and an informed electorate." 519 F.2d. 821, 873 (D.C.Cir. 1975).[5]

In the years since *Buckley*, the express advocacy doctrine has been an indispensable bulwark against overzealous efforts to regulate core political speech. From *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980)(*en banc*)(finding the Commission's enforcement suit against a tax protest group to be "totally meritless"), to *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997) (invalidating FEC regulations on limiting voter guides), the government has suffered "a string of losses in cases between the FEC and issue advocacy groups over the meaning of the phrase 'express advocacy' and the permissible scope of the FEC's regulatory authority over . . . political speech." *Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997)(authorizing an award of fees and costs against the Commission for bringing enforcement proceedings against an issue group in clear violation of this Court's "express advocacy" doctrine).

We detail this history not to question the good faith enforcement in any of these proceedings, but because the persistent and relentless campaign to test and diminish the express advocacy doctrine has an impact on the world of issue-oriented organizations and the way that they speak about and relate to public officials who are also candidates for federal elective office. "[T]he value of a sword of Damocles is not that it drops, but that it hangs." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974)(Marshall, J., dissenting).

These efforts to dilute the express advocacy test make the major purpose test even more important for issue advocacy groups that wish to criticize political figures without placing their entire organizations at risk of being deemed political committees. The decision below obliterates that safeguard, and thus poses a serious threat to the issue advocacy of such groups.

B. The Major Purpose Test

The major purpose test was forged in the same crucible as the express advocacy doctrine. The latter was fashioned to protect issue-oriented speech from being treated as partisan advocacy unless it meets a bright line test; the former protects issue-oriented speakers from being treated as political committees even if an incidental amount of their advocacy or activity can be characterized as campaign related or partisan. It is a second line of defense against official encroachment on issue organizations. Just like the two-pronged test of incitement in *Brandenburg v. Ohio*, 395 U.S. 444, requiring both prohibited content and triggering context, the two features here combine to protect issue advocacy. Both features must be satisfied before a group can be subject to all the rigors and regulations of a "political committee."

The court below nevertheless found that the major purpose test was inapplicable for two reasons. First, in the view of the court below, the test focuses on the major pur-

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[4] (...continued)
hold their votes from such candidate shall file reports with the Commission as if such person were a political committee.

[5] Section 437a has since been repealed. Pub.L.No. 94-283, Title I, §105, 90 Stat. 481 (1976).

pose of the contribution or expenditure, not the organization making it. Second, the court below held that the major purpose test is only triggered by government attempts to regulate expenditures, not contributions. Neither argument withstands scrutiny.

1. The Major Purpose Test Turns On The Nature Of The Organization, Not The Nature Of The Expenditure Or Contribution

The major purpose test originated in *United States v. National Committee for Impeachment*, *ACLU v. Jennings*, and the *en banc* decision in *Buckley v. Valeo*. Those cases made clear that the concept was primarily designed to define and limit the term "political committee" by focusing on the speaker, not to define and limit the terms "contribution" or "expenditure" by focusing on the speech. The express advocacy concept would come to serve that latter limiting function.

Thus, in *Impeachment Committee*, the Second Circuit not only ruled that the content of the impeachment advertisement could not serve as the basis for campaign regulation, but also that the Act's "political committee" definitions could only apply "to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates . . . ." even though, "under this interpretation, enforcement of the Act may be made somewhat more burdensome, as the supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." 469 F.2d at 1141.

In *ACLU v. Jennings*, the court again separated the question of the kind of speech from the question of the nature of the speaker when it adopted the Second Circuit's

definition of a political committee. The provision controlling media expenditures "on behalf of" a candidate was ruled an unconstitutional prior restraint, while the issue group's concern that an open-ended definition of "political committee" might ensnare its nonpartisan issue advocacy was addressed as the Second Circuit had done. Specifically, the *Jennings* court limited the reach of the political committee concept by holding: "(1) the determinative phrase 'made for the purpose of influencing,' is to include only those expenditures made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents,' and (2) Title III is applicable only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates.'" 366 F.Supp. at 1057, quoting *National Committee for Impeachment*, 469 F.2d at 1141.

By the time the matter was taken up by the *en banc* circuit court in *Buckley*, it was virtually settled law that "a group will be considered a political committee only if it makes its expenditures under the control or with the consent of a candidate, or if the major purpose of its expenditures is the nomination or election of candidates. Nonpartisan issue groups are therefore not covered." 519 F.2d at 864.

These cases formed the acknowledged backdrop for this Court's adoption of the major purpose test as a constitutionally indispensable limit on the otherwise impermissible reach of the "political committee" designation when applied to nonpartisan and noncampaign groups. The *Buckley* Court was animated by three key concerns: First, the extremely broad reach of the term "political committee," which the Act defines in terms of the problematically vague notion of activities undertaken "for the purpose of . . . influencing" an election; second, the extraordinary series of burdens imposed

on those entities deemed "political committees;"[6] and third,

[6] The Court described the statutory requirements as follows:

> Each political committee is required to register with the [Federal Election] Commission, §433, and to keep detailed records of both contributions and expenditures, §§432(c), (d). These records must include the name and address of everyone making a contribution in excess of $10, along with the date and amount of the contribution. If a person's contributions aggregate more than $100, his occupation and principal place of business are also to be included. §432(c)(2). These files are subject to periodic audits and field investigations by the Commission. §438(a)(8).
>
> Each committee and each candidate also is required to file quarterly reports. §434(a). The reports are to contain detailed financial information, including the full name, mailing address, occupation, and principal place of business of each person who has contributed over $100 in a calendar year, as well as the amount and date of the contributions. §434(b). They are to be made available by the Commission "for public inspection and copying." §438(a)(4). Every candidate for federal office is required to designate a "principal campaign committee," which is to receive reports of contributions and expenditures made on the candidates's behalf from other political committees and to compile and file these reports, together with its own statements, with the Commission. §432(f).
>
> Every individual or group, other than a political committee or candidate, who makes "contributions" or "expenditures" of over $100 in a calendar year "other than by contribution to a political committee or candidate" is required to file a statement with the Commission. §434(e). Any violation of these recordkeeping and reporting provisions is punishable by a fine of not more than $1,000 or a prison term of not more than a year, or both. §441(a).

424 U.S. at 63-64. A decade later, in *FEC v. Massachusetts Citizens for Life*, the Court would describe in even greater detail the more specific financial and accounting requirements imposed on political committees. *See* 479 U.S. at 253-54. The only significant change in these require-

(continued...)

the fact that the Act mandates compelled disclosure of contributors and supporters.

Using the congressional focus on "campaign-oriented spending" as its touchstone, the *Buckley* Court noted that FECA's broad statutory definition of a "political committee" had the dangerous potential "for encompassing both issue discussion and advocacy of a political result." 424 U.S. at 79. In crucial language, the Court continued:

> The general requirement that "political committees" and candidates disclose their expenditures could raise [serious] vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" or "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly.[106] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

[106] At least two lower courts, seeking to avoid questions of unconstitutionality, have construed the disclosure

[6] (...continued)
ments since this Court described them in *Buckley* was that the recordkeeping and reporting thresholds for contributors were raised from $10 and $100 to $50 and $200, respectively.

> requirements imposed on "political committees" by §434(a) to be nonapplicable to nonpartisan organizations. *United States v. National Comm. for Impeachment*, 469 F.2d at 1139-1142; *American Civil Liberties Union v. Jennings*, 366 F.Supp. at 1055-1057. *See also* 171 U.S. App. D.C., at 214 no. 112, 519 F.2d at 863 n.112.

In the very next paragraph, the Court further protected such nonpartisan issue groups from even the less demanding reporting requirements imposed by §434(e) on groups other than "political committees," *i.e.*, groups whose major purpose is *not* the nomination or election of a candidate. The Court did so by holding that §434(e)'s requirements only applied to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80 (footnote omitted). The Court in *Buckley* thus created a clear and sensible regime for protecting nonpartisan issue advocacy groups from government overreaching and its chilling effect on First Amendment expression.

The soundness of this approach was reaffirmed a decade later in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, where the Court revisited the regulation of issue advocacy groups whose major purpose is not the partisan election of candidates. In four separate places the Court made it clear that the major purpose test focuses on the nature of the organization and not, as the lower court erroneously held in this case, on particular contributions or expenditures.

Upholding the right of an incorporated anti-abortion group to engage in what this Court held was express advocacy, the Court first noted that if the group were not incorporated yet made certain express advocacy "expenditures," the major purpose test would still protect the group from being regulated as a political committee. Its only obligation would be to comply with the less burdensome requirements of §434(c)(formerly 434(e)): "All unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these regulations." 479 U.S. at 252-53.

Second, the Court highlighted in a footnote, *id.* at 252 n.6, the fact that MCFL was not primarily a partisan political organization:

> In *Buckley* . . . this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. It is undisputed on this record that MCFL fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

Third, the Court noted with disapproval that the FEC's effort to equate ideological corporations with for-profit corporations under the Act would mean that "all MCFL independent expenditure activity is, as a result, regulated as though the organizations's major purpose is to further the election of candidates." *Id.* at 253.

Finally, the Court concluded that the government's legitimate interests could be adequately served by subjecting MCFL to the more targeted disclosure requirements of §434(c), at least so long as its express advocacy remained only an incidental undertaking and not the organization's major purpose:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity,

> the corporation would be classified as a political committee. *See Buckley*, 424 U.S. at 79. As such it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

479 U.S. at 262.[7]

Buckley and *Massachusetts Citizens for Life* make clear that the major purpose test was adopted by this Court to protect issue organizations that are not political committees from being treated as if they were. The suggestion below that the reason for the major purpose doctrine is simply to create a presumption that all spending by a candidate committee or partisan organization is a covered "expenditure" misreads and indeed trivializes the protective doctrine this Court fashioned and the background that motivated the Court's action. That doctrine was fashioned to protect issue-oriented groups from being subjected to regulation and control as political committees, not to insure full reporting by candidate-authorized political committees.[8]

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[7] That discussion is particularly significant since the Court found that MCFL had made approximately $10,000 in express advocacy independent expenditures, yet ruled that it could not be treated as a political committee because such partisan communications were not the major purpose of the organization.

[8] The concept of inquiring whether the major purpose of making a contribution or expenditure -- acts which are themselves defined by whether they have a political purpose -- is political has a strongly tautological and elusive quality as well. By contrast, inquiring into the major pur- (continued...)

The regulatory regime resulting from this Court's doctrines is one which well serves both the interests of the government in disclosure of campaign funding and the interests of issue groups in unfettered commentary and criticism on public issues and public officials. Under that structure, issue groups have various options. They can forego any commentary or activity that would constitute "express advocacy" of specific electoral outcomes and be totally free to use their resources without limit or regulation to communicate their message. Alternatively, they may devote a relatively small portion of their resources to express advocacy and only be required to disclose the amounts tailored to and reflecting their actual partisan activity. Moreover, those groups that take the corporate form and do not wish to be treated as political committees can seek an "MCFL exemption" for ideological corporations.

2. The Major Purpose Test Does Not Turn On The Distinction Between Expenditures and Contributions

In rejecting the application of the major purpose test here, the court below placed wooden reliance on the distinction between contributions and expenditures. However, once it is understood that the major purpose test applies to organizations, not to contributions or expenditures, the court's effort to distinguish between contributions and ex-

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[8] (...continued)
pose of an organization which has made an expenditure or a contribution is a much more familiar and accessible inquiry. One court applying the major purpose test has suggested that "the organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates. *See, e.g., FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986)." *Federal Election Commission v. Gopac, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996).

penditures makes little sense. As just described, the function of the major purpose test is to protect issue advocacy from the chilling effect of the comprehensive regulatory scheme that accompanies political committee status. The potency of that chilling effect does not depend on whether the designation as a political committee is triggered by incidental contributions or incidental expenditures. In either event, the constitutional infirmity lies in the fact that constitutionally protected expression is discouraged. In short, the regulatory scheme envisaged by the court of appeals is one in which the tail wags the dog. When dealing with First Amendment speech, the government must regulate with greater precision. *NAACP v. Button*, 371 U.S. 415 (1963).

To be sure, an organization can insulate its issue advocacy from government regulation by refraining from any covered expenditures or contributions in excess of $1,000. But it is hardly a sufficient answer to say that one constitutional right can be rescued by sacrificing another. *Cf. Sherbert v. Verner*, 374 U.S. 398 (1963)(government benefits cannot be conditioned on the waiver of constitutional rights). Even the court below recognized that the First Amendment price was too high to pay in the case of incidental expenditures. It is also too high to pay when incidental contributions are at stake.

Contributions may be subject to greater regulation than expenditures under this Court's precedents, but they are still a form of political activity protected by the First Amendment. By abandoning the major purpose test, the decision below forces organizations to forego otherwise permissible political contributions or accept otherwise impermissible restrictions on issue advocacy. That compelled choice is unconstitutional, especially given the existence of other, less restrictive regulations that already govern contributions by organizations that do not meet the major purpose test. *See* pp.27-30, *infra*.

Moreover, the chilling effect of a regulatory scheme that does not include the major purpose test is magnified in this context because the interpretation of what constitutes a contribution is itself such a malleable one. The statute at almost every point defines contributions and expenditures in virtually the same language, and prohibitions on, for example, corporate contributions or expenditures are written in tandem. *See* 2 U.S.C. §441b(a). It is this Court's decisions that have determined whether activities are properly treated as one or the other and then properly subject to regulation for different purposes.

Contributions directly given to candidates are most subject to control because of the Court's conclusion that they involve second-hand speech but primary possibilities for the actuality or appearance of corruption. Expenditures which are in fact coordinated with candidates are regulated as though they were contributions because, by virtue of their prearranged nature they take the place of, pose the same concerns as and, if in excess of the permitted amounts, could be prohibited like contributions. They are surrogate contributions. Independent expenditures for express advocacy are at the core of the First Amendment and are different from direct contributions to candidates because they embody direct rather than proxy speech and because they involve fewer of the concerns with the appearance or reality of corruption. And, of course, pure issue speech is beyond the pale of any regulation.

The isolated instances of arguably campaign-related activity in this case are difficult to place on the spectrum because they are a hybrid of different factors. There were allegations of some campaign-related contacts and communications and discussion between AIPAC staffers and candidates or their representatives, after which there were communications to certain AIPAC members who thereafter, on their own, apparently made contributions to those candi-

dates. AIPAC disputed that its staff members put candidate fundraisers and AIPAC members in touch with each other. AIPAC took the position that, since virtually none of those post-contact communications involved express advocacy of those candidates, they could not be deemed contributions or expenditures. The FEC Counsel disagreed, ruling that once AIPAC had any conversation or discussion with candidates about their campaigns, "any subsequent activity or communication AIPAC undertakes regarding that candidate that goes beyond its members would have to be viewed as activity or communications undertaken in coordination or consultation or in concert with the candidate's campaign." General Counsel's Report at 24. This characterization had two consequences. First, the express advocacy test became irrelevant. Second, the court of appeals later ruled that the major purpose test was inapplicable because AIPAC activities were "in-kind contributions," not protected "expenditures."

Issue groups cannot function effectively in an environment where their contacts with elected officials about campaign-related issues ("Has your pro-choice stance hurt you in your district"?) bars them from any future issue advocacy relating to that candidate ("Smith is pro-choice") because this non-express advocacy will be viewed as a coordinated expenditure, hence a contribution, and thus not subject to the major purpose test. Issue groups cannot easily survive in an environment with rules that so easily presume that inquiry and discussion have become collaboration and coordination.[9]

In this core area of issue advocacy, government must demonstrate much more precision of regulation so that speakers do not "steer far wider of the unlawful zone."

[9] *See Clifton v. FEC*, 114 F.2d 1309 (invalidating FEC requirements that contacts between issue organizations and candidates with respect to voter guide information be in writing and not oral).

Speiser v. Randall, 357 U.S. 513, 526 (1958). That is why the *en banc* court's approach to the distinction between contributions and expenditures poses grave perils to issue organizations.

C. The Government's Legitimate Interests In This Case Can Be Served Through More Narrowly Tailored Means

As construed by the *en banc* court, the term "political committee" fails strict scrutiny because it lacks the required close fit "between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64. Indeed, the fact that the government has appealed the decision below should be dispositive of the claim that it is necessary to achieve the government's interests.

This Court has been sensitive to two kinds of burdens on core political expression in the campaign finance cases: "the chilling effect of reporting and disclosure requirements on an organizations' contributors," and "the potential burden of disclosure on a group's own speech." *Massachusetts Citizens for Life*, 479 U.S. at 265-66 (O'Connor, J., concurring). *See also Buckley*, 424 U.S. at 64. The burdens of regulation and disclosure visited upon "political committees" are extensive, *see* n.6, *supra*. For established groups like AIPAC, they can create significant deterrents to engaging in any discussion or advocacy that might cross the line. For smaller and less well-established organizations, the burdens of political committee regulation can be crushing, as this Court recognized in *Massachusetts Citizens for Life*.

For all groups, the burdens of disclosure and identification on individual and associational privacy and members rights can be substantial. *See NAACP v. Alabama*, 357 U.S. 449 (1958); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334. People who thought they were contributing to a

cause may be distressed to find the government will deem them to have been contributing to a candidate and subject to public disclosure as a result. To visit such consequences on cause organizations that engage, incidentally and indirectly and with an insubstantial amount or proportion of their resources, in activities that might be deemed in some way to be "campaign-related," is a disproportionate and constitutionally indefensible response.[10]

Moreover, this burden is unnecessary to achieve the government's interest in disclosing the sources of campaign-related funding. As this Court has previously observed, the major purpose test leaves ample and properly tailored remedies available to secure those compelling interests in ways less burdensome for core First Amendment rights. Section 434(c) is the major statutory mechanism for disclosure by groups and individuals that are not candidates or political committees when: "(1) they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee; and (2) they make expenditures for

[10] In this regard, the situation is parallel to in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), where this Court held unconstitutional a congressional statute which demanded that any public broadcasting station which received even the most minimal amount of federal funding must totally refrain from any engaging in any "editorializing." Thus, a station which got 1% of its funding from federal sources was barred from using any of the remaining 99% of its own resources for the most strongly protected speech. Here, too, under the approach of the court below, any modest issue-oriented organization which uses the most minimal amount of its resources in a "campaign-related" way, would be forced to register, restructure, report and disclose its entire undertaking. See also *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995)(invalidating as a "crudely crafted burden" on First Amendment activities a Congressional statute prohibiting almost all federal employees from receiving compensation for making any speeches or writing any articles).

communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. at 80.

In addition, candidates, political committees and other beneficiaries or recipients of "contributions" or "expenditures" are subjected to significant reporting and disclosure requirements. 2 U.S.C. §434(b)(3). Unlike the all-or-nothing approach adopted by the court below, such measures are "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo*, 424 U.S. at 80. As the Court explained in *Massachusetts Citizens for Life*,

> an independent expenditure of as little as $250 . . . will trigger the disclosure provisions of section 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committees under the Act.

479 U.S. at 262. If a group reaches the point where such partisan actions become its major purpose, the constitutional balance shifts, and the state's interest in assuring fuller accountability is entitled to greater weight.

The decision below rejects this careful weighing of interests. Instead, it endorses a regulatory scheme that will inevitably lead to the "unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25. This Court should not sanction that result.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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